

# Addressing Gender Stereotyping

Presented by

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# Overview

- Sex (Gender Identity and Gender Expression)  
Discrimination and Sexual Orientation  
Discrimination Complaints

# Protected Bases: EEOC/USDA

## Adjudication

Equal Employment Opportunity Commission	USDA
<ul style="list-style-type: none"><li>• Race</li><li>• Color</li><li>• National origin</li><li>• Sex<ul style="list-style-type: none"><li>❖ Transgender (gender identity)</li><li>❖ Sex Stereotyping</li></ul></li><li>• Age</li><li>• Disability</li><li>• Religion</li><li>• Genetic information</li><li>• Retaliation</li></ul>	<ul style="list-style-type: none"><li>• Political beliefs/affiliation</li><li>• Sexual orientation</li><li>• Public assistance income</li><li>• Familial/parental status</li><li>• Marital status</li><li>• Limited English proficiency</li></ul>

# Sex Discrimination

- Sex Discrimination involves treating someone unfavorably because of that person's sex.
- The law forbids discrimination when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, and any other term or condition of employment.

# Sex Discrimination

- **Gender Expression:** The way an individual expresses his or her gender identity. May or may not conform to social stereotypes associated with a particular gender.
- **Gender Identity:** An individual's internal sense of being male or female.
- **Transgender:** People with a gender identity that is different from the sex assigned to them at birth.
  - Someone who was assigned the male sex at birth but who identifies as female is a *transgender woman*. Likewise, a person assigned the female sex at birth but who identifies as male is a *transgender man*.
- *See OPM Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace*

# Sex Discrimination

- Sex Stereotyping: Failing to act and appear according to expectations defined by gender.
  - Women: being too aggressive in the workplace, not wearing enough jewelry or make up
  - Men: non-masculine clothes, baking skills, managerial skills and work style

# Sex Discrimination

- A female senior manager in an accounting firm was denied partnership in the firm, in part, because she was considered “macho.” She was advised that she could improve her chances for partnership if she were to take “a course at charm school,” “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.” *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)

# Sex Discrimination

- Smith v. City of Salem, Ohio, 378 F.3d 566 (6<sup>th</sup> Cir 2004)
  - A firefighter was biologically a male but started to identify as a woman and began to express a more feminine appearance at work
  - Co-workers began questioning him and commenting that his appearance and mannerisms were not “masculine enough”
  - Supervisors attempt to use his transsexualism and its manifestations as a basis for terminating his employment
- 6th Cir held that, “After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex. It follows that employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex.”



# The *Macy* Decision

- *Macy v. Dep't of Justice* (EEOC Appeal No. 0120120821)
  - The transgender complainant, while still known as a male, requested and received a transfer from Arizona to California
  - While undergoing a background check just prior to the job transfer, the complainant informed the Agency that she was transitioning from a male to a female
  - Five days after notifying the Agency of her transition, the complainant was told that the position was no longer available due to budget restrictions. The complainant found out that the Agency hired someone else for the position.

# The *Macy* Decision

- Procedural processing
  - The complainant listed the following bases on her EEO complaint:
    - “Sex (female), gender identity, sex stereotyping”
  - The Agency accepted only the basis of sex (female) for Title VII processing
    - The Agency planned to process the “gender identity stereotyping” claim under the Agency’s alternative non-Title VII procedures (fewer remedies, no EEOC AJ, no appeal rights)

# The *Macy* Decision

- Holding
  - Claims of discrimination based on transgender status (gender identity) are cognizable under Title VII's sex discrimination prohibition and should be processed using EEOC procedures.
    - Title VII prohibits gender discrimination, which encompasses not only a person's biological sex, but also the cultural and social aspects associated with masculinity and femininity. Gender discrimination occurs any time an employer treats an employee differently for failing to conform to any gender-based expectations or norms.
  - The complaint was remanded for processing under Title VII procedures.

# The *Macy* Decision

- Transgender discrimination is sex discrimination.
  - This is not a new protected basis.
  - Sex stereotyping evidence is only one of several ways to demonstrate transgender discrimination.
    - Transgender discrimination includes discrimination based on gender stereotypes, discrimination based on discomfort with a gender transition, and discrimination based on dislike of transgender identity.

# Post- *Macy*

- David J. Baker, Complainant, EEOC DOC 0120110008, 2013 WL 1182258 (Jan. 11, 2013)
- Complainant alleged that he was subjected to hostile work environment harassment based on sex when his supervisors:
  - used such terms as “Honey,” “Sweetie” or “Baby” in reference to him
  - Snapped her thumbs and fingers or do limp-wristed stereotypically gay gestures which were “completely mimicking in nature” and “mocking homosexuality.” Complainant asserted that when he told his supervisor that he was offended by her gestures; her reply to him was “get over it.”
  - told him that he “was too flamboyant for a bureaucratic environment and suggested that perhaps [he] should work elsewhere where [he] could be flamboyant
  - subjected him to ongoing derogatory comments about his sexual orientation and mannerisms
- “As long as the allegations state a viable claim of sex discrimination, the fact that a Complainant has characterized the basis of discrimination as sexual orientation does not defeat an otherwise valid sex discrimination claim. Title VII does not explicitly include sexual orientation as a basis for protection under the law. Nevertheless, the law's broad prohibition of discrimination “on the basis of . . . sex” will offer coverage to gay individuals in certain circumstances.”
- Commission held such allegations are sufficient to state a claim that Complainant was discriminated against for failure to match gender-conforming behavior and thus state a claim based on sex discrimination. Remanded the matter on all bases alleged for a hearing and further consideration by an AJ.

# Sexual Orientation Discrimination

- No federal law prohibits employment discrimination based on sexual orientation
- Executive Order 13087 prohibits the federal government from discriminating against federal employees based on sexual orientation
- Employees and applicants may file a discrimination complaint with USDA but may not seek relief from EEOC or file a discrimination complaint under Title VII of the Civil Rights Act of 1964

# Sex v. Sexual Orientation Discrimination: *Shay*

- Shay A. Hitchcock, Complainant, EEOC DOC 0120051461, 2007 WL 1393665 (May 3, 2007)
- Complainant alleged he was discriminated against when he was forced to resign from his probationary position and management subjected him to a hostile work environment
- Co-workers allegedly made statements such as:
  - Called him “qu---” and “fa----”
  - He did “women's work”
  - “Why are you doing such feminine work? You would make someone a good wife one day.”
  - He would “bi--- like his old woman,”
  - “A real man does not ... ask opinions, he just does it.”
- Is this a sex discrimination or sexual orientation discrimination complaint?



# Sex v. Sexual Orientation Discrimination: *Shay*

- Commission found that the complainant established a genuine issue of material fact as to whether he was subjected to sex discrimination.
- Merely because a complainant includes allegations of derogatory terms (“qu---” and “fa----”) does not automatically make it a sexual orientation complaint.
- However, EEOC has made it clear in all of its recent presentations and training sessions that it has yet to see a sexual orientation case that isn’t also a sex discrimination case with gender stereotyping involved.
- Thus, EEOC advises processing all sexual orientation cases as sex discrimination cases



# Sex v. Sexual Orientation Discrimination: *Vickers*

- Vickers v. Fairfield Medical Center, Taylor v. H.B. Fuller Co., 453 F.3d 757 (6<sup>th</sup> Cir. 2006) (same court as *Smith v. Salem*)
  - Vickers alleged harassment because of his association with a homosexual colleague and suffered physical harassment, frequent derogatory comments including “Fa-” and “ga-”, co workers ridiculing him for being gay, subjecting him to vulgar gestures, placing irritants and chemicals in his food and other personal property, and making lewd remarks suggesting that he provide them with sexual favors.
- Is this a sex discrimination or sexual orientation complaint?

# Sex v. Sexual Orientation Discrimination: *Vickers*

- Holding: Employee did not establish that he was discriminated against because of sex stereotyping.
  - “Vickers has made no argument that his appearance or mannerisms on the job were perceived as gender non-conforming in some way and provided the basis for the harassment he experienced. Rather, the harassment of which Vickers complains is more properly viewed as harassment based on Vickers' perceived homosexuality, rather than based on gender non-conformity.”
  - “Ultimately, recognition of Vickers' claim would have the effect of *de facto* amending Title VII to encompass sexual orientation as a prohibited basis for discrimination. In all likelihood, any discrimination based on sexual orientation would be actionable under a sex stereotyping theory if this claim is allowed to stand, as all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices. Indeed, this may be Vickers' intent; he argues in his brief that the unique nature of homosexuality entitles it to protection under Title VII sex discrimination law.”

# Sex v. Sexual Orientation Discrimination:

## *Vickers & Smith*

- The Sixth Circuit appears to contrast *Smith*, where the colleagues and supervisors explicitly stated he was not “masculine enough” and attempted to take an adverse employment action based on his femininity, with *Vickers*, where his colleagues focused their animosity against sexual orientation.

# Sex v. Sexual Orientation Discrimination: *Veretto*

- Veretto, v. USPS, EEOC DOC 0120110873, 2011 WL 2663401 (July 1, 2011)
  - Complainant published a notice in the newspaper of his marriage to another male. When a coworker (CW) learned of the announcement, he became extremely upset and began yelling about the fact that complainant was marrying another man.
  - A few weeks later, complainant had a disagreement with CW's wife, who worked next to him, over the placement of a cart. Complainant alleged that CW intervened, "charging" into Complainant's work area, bumping his chest into Complainant's chest, poking Complainant in the chest, backing him up and trapping him. Complainant contended that throughout this assault, CW continued to scream and swear, including threatening Complainant that, "I will beat you, you fu----- qu---."
  - CW was removed from the workplace for three months but was not permanently reassigned to another location as requested by complainant.
- Did the Agency err in dismissing the complaint for failure to state a claim, reasoning that complainant was really alleging discrimination based on his sexual orientation, not his gender, and therefore had not asserted a claim under Title VII?

# Sex v. Sexual Orientation Discrimination: *Veretto*

- Commission found that the complainant alleged a plausible sex stereotyping case which would entitle him to relief under Title VII if he were to prevail.
- Complainant argued that CW was motivated by the sexual stereotype that marrying a woman is an essential part of being a man, and became enraged when complainant did not adhere to this stereotype by announcing his marriage to a man in the society pages of the local newspaper.
- Complainant further alleged that the Agency should be held liable for CW's actions because it failed to take appropriate corrective action once the harassment was reported to management.
- These allegations were sufficient to state a viable hostile work environment claim under Title VII.

# Sex v. Sexual Orientation Discrimination: *Castello*

- Castello v. USPS, EEOC DOC 0520110649, 2011 WL 6960810 (Dec. 20, 2011)
  - A manager commented that the lesbian complainant “gets more pu--- than the men in the building.”
- Commission found that complainant argued that the manager was motivated by the sexual stereotype that having relationships with men is an essential part of being a woman, and made a negative comment based on Complainant's failure to adhere to this stereotype.
- Commission held in light of the *Veretto* that Complainant's allegation was sufficient to state a viable hostile work environment claim under Title VII.



# Sex v. Sexual Orientation Discrimination: *Robertson*

- Robertson v. Siouxland Cmty. Health Ctr., C 13-4008-MWB, 2013 WL 1446272 (N.D. Iowa Apr. 10, 2013)
- Petitioner alleged that she was harassed and discriminated against *both* because of her sex (female) *and* because of her sexual orientation (lesbian).
- She claimed she was subjected her to unwanted and unwelcomed sexual comments, sexual questions, sexual conversations, sexual emails, sexual texts, and sexual jokes,” including a list of twenty incidents, and that management knew or should have known of the hostile environment and discrimination, but that they failed to take corrective action and, indeed, encouraged the harassment and retaliated against her for objecting to it.
- In her administrative Complaint of Discrimination to her Petition which she filed as an exhibit, in answer to the, “Do you believe you were discriminated against because of your sex?,” she answered “no,” and in response to the question, “Do you believe you were discriminated against because of your sexual orientation?,” she answered “yes” and indicated that her sexual orientation is “Lesbian”.
- Judge held that Title VII has not been construed to permit claims based on sexual orientation.

# Lessons Learned

- Fact specific inquiry
- Standard of what constitutes a sex discrimination versus a sexual orientation complaint may vary depending on the forum and jurisdiction
- EEOC advises erring on the side of caution and processing all sexual orientation cases as Title VII cases because they will inevitably have a gender stereotyping component
- Stay current on the law, if you have a question, please ask



# Common Concerns

- Dress Codes
- Be very careful with dress code policies.
- Any limitations on clothing or accessories must be applied to everyone regardless of sex.
- Any limitations or requirements should be based on neutral, business reasons.
- Ex. Food Safety Inspectors not wearing jewelry or nail polish.

# Common Concerns

- One of the most common concerns in the employment context involves which bathroom a transgender employee uses.
- OGC maintains that it is inappropriate to force a transgendered employee to use a segregated bathroom.
- As long as an individual behaves appropriately in the bathroom, there is no need for intervention by management.
- Any employees who are “uncomfortable” sharing a bathroom with a transgendered individual need to select a different bathroom to use. The burden should not be on the transgendered employee.

# Common Concerns

## Participation in Pride Month Events

- Federal employment is a privilege not a right
- When you accept a Federal job you also agree to certain rules of conduct (DR 4070-735-001)
- The Federal Government generally has the authority to regulate an employee's private speech, including religious speech, where the employee's interest in that speech is outweighed by the government's interest in promoting the efficiency of the public services it performs.

# Common Concerns

- Don't anticipate that co-workers will reject a transgendered employee
- It is not appropriate to ask a transgendered employee to declare his or her status or address his or her co-workers about their gender identity



# Contact OGC



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